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Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE J. BRADY, BARBARA A. BRADY,
DEBORAH R. LABOVITZ, AND JUDAH I. LABOVITZ,

PETITIONERS,

V.

THE STATE OF NEW YORK, MARIO CUOMO,
AND JAMES WETZLER,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether New York's method of taxing the income of nonresidents, as amended in 1987 (N.Y. Tax Law § 601(e)), violates the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of the United States Constitution.

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W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309 (1974) 17, 21, 22

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The opinion of the New York Court of Appeals (App., *infra*, 3a - 16a) is reported at 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060. The opinion of the Appellate Division of the New York Supreme Court (App. 17a - 24a) is reported at 172 A.D.2d 17, 576 N.Y.S.2d 896. The trial court's opinion (App. 25a - 30a) and order (App. 31a - 33a) are not reported.

JURISDICTION

The judgment of the New York Court of Appeals (App. 16a) was entered on December 22, 1992. On March 9, 1993, Justice Thomas extended the time within which to petition for a writ of certiorari to and including April 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; and the pertinent provisions of sections 601(d) and 601(e) of the New York Tax Law, are set out in a statutory appendix (App. 1a - 2a).

STATEMENT

1. For many years, New York has imposed its income tax on both residents and nonresidents. Prior to 1987, nonresidents were taxed under a method that considered only their New York source income. A nonresident calculated taxable New York income by subtracting from gross New York source income the exemptions and deductions to which he or she was entitled. Taxable New York income was then multiplied by the applicable graduated tax rate to determine the tax due. Under this methodology, residents and nonresidents with identical New York source income and deductions would have identical tax liabilities.

New York amended its Tax Law in 1987. The new statute had the effect of decreasing tax rates generally, an effect obviously beneficial to New York residents, while at the same time increasing the taxes due from nonresidents. The latter result was accomplished by adding § 601(e) to the Law, effective in 1988.

Under new § 601(e), a nonresident taxpayer is required, for the first time, to calculate his or her New York tax liability by deriving it from the tax determined "as if such nonresident . . . were a resident." To make this determination, § 601(e) requires the nonresident taxpayer to proceed in two steps. First, the nonresident must calculate the amount of New York tax that would be payable on the total amount of his or her income from all sources, not just New York. With certain modifications, this amount is the same as federal "adjusted gross income" as reported to the IRS. Thus, in the case of a married nonresident taxpayer filing a joint federal return, the total income required to be used in this calculation is the total of the incomes of both the taxpayer and the taxpayer's spouse. That is so even if the spouse is also a nonresident and has no income whatever from New York sources.

The second step involves apportioning part of this calculated New York tax to the State. This is done by multiplying the calculated tax by an apportionment fraction (New York income divided by adjusted gross income). The result is the nonresident's New York tax liability.

As part of the same 1987 law, New York also imposed a new surtax on unearned (investment) income of residents and nonresidents. The surtax, enacted as § 601(d) of the Law, was imposed only for 1987 and 1988. When § 601(e) became effective in 1988, the interrelationship of the two statutory provisions for that one year resulted in nonresidents paying more tax even if they had no unearned income from New York sources. This is because, under § 601(e), a nonresident must first compute a New York tax on total income as if he or she were a resident, and because New York taxes its residents' unearned income without regard to the state of its origin. The statutory scheme thus had the practical effect of imposing the New York surtax on nonresidents' investment income that had no nexus to New York.

The impact of the 1987 amendments may be illustrated by a simplified example. Assume a New York and a Pennsylvania resident, each of whom is married and earns New York taxable income of $18,000. Assume that the Pennsylvania resident also has Pennsylvania source income of $30,000, of which $10,000 is unearned; and that his spouse has Pennsylvania source income of $70,000, of which $25,000 is unearned. Assume that none of the four people has any other income.

For the 1986 tax year, the New York and the Pennsylvania residents would each pay the same tax on their New York income,

namely, $1,145.[1] For the 1988 tax year, on identical facts, the New York resident would pay tax of $772—33% less than he paid in 1986.[2] The Pennsylvania resident would pay tax of $1,346—18% more than he paid in 1986, and 74% more than his New York counterpart pays in 1988.[3] This heavier tax burden has two causes: (1) the inclusion in the tax computation of Pennsylvania source income of the taxpayer and his spouse, which pushes him into a higher tax bracket; and (2) the imposition of New York's unearned income surtax on the couple's Pennsylvania investment income. New York originally estimated that the overall effect of the 1987 amendment would be to increase the tax burden of nonresident taxpayers by approximately $50 million annually.[4] The actual tax burden has since grown to $80 million.[5]

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1 Both taxpayers would be in a 10% marginal bracket for 1986 and both would pay tax of $945 on the first $16,000 of income, plus 10% of the excess between $16,000 and $18,000.

2 The New York resident would be in a 6% marginal bracket for 1988 and would pay tax of $568 on the first $14,600 of income, plus 6% of the excess between $14,600 and $18,000.

3 The Pennsylvania resident's New York income would be combined with his Pennsylvania income and that of his spouse, for a total of $118,000. This would put him in an 8% marginal bracket. He would compute a hypothetical New York tax of $8,696, plus a tax of $126 on the couple's Pennsylvania investment income, for a total of $8,822. That figure would be multiplied by an apportionment fraction of 15.25% ($18,000 divided by $118,000), yielding a New York tax liability of $1,346.

4 N.Y. Times, Feb. 16, 1989, at A1.

5 *State Tax Notes* 708 (Mar. 29, 1993).

2. Petitioner Lawrence Brady is a resident of New Jersey and was employed in New York during the relevant tax period. His wife, petitioner Barbara Brady, resided in New Jersey and was employed there. App. 3a. Petitioner Deborah Labovitz is a resident of Pennsylvania and was employed in New York during the relevant tax period. Her husband, petitioner Judah Labovitz, resided in Pennsylvania and was employed there. App. 3a. Lawrence and Deborah were "nonresident taxpayers" subject to § 601(e) of the New York Tax Law. Neither of their spouses had New York source income of any kind. App. 3a, 17a.

Petitioners brought this action in March 1989 in the New York Supreme Court, Albany County. Their amended complaint sought damages and injunctive and declaratory relief for themselves and for a class of similarly situated nonresident taxpayers. Petitioners contended, among other things, that New York's scheme for taxing nonresidents is unconstitutional on its face and as applied because it (1) violates the Due Process Clause of the Fourteenth Amendment by, in effect, imposing a tax on income from non-New York sources; and (2) violates the Privileges and Immunities clause by discriminating against nonresidents. The facts on the constitutional issues were not contested, and the case was submitted on cross-motions for summary judgment to the trial court, which ruled for the State in all respects. App. 25a, 31a.

On appeal, the Appellate Division of the Supreme Court affirmed in part and reversed in part. App. 17a.[6] The court sustained petitioners' due process challenge to the application against nonresidents of Tax Law § 651(b)(2), which generally requires a married couple to file a joint New York return if they file a joint federal return. The court noted that this provision rendered a nonresident spouse liable for a variety of New York

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6 The Commonwealth of Pennsylvania appeared in the Appellate Division as amicus curiae supporting petitioners.

taxes and penalties despite the fact that he or she has no New York income and no other contacts with the State. App. 20a. Citing the Court's decision in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), the Appellate Division concluded that "[o]ut-of-State cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power." App. 20a. The court accordingly held that § 651(b)(2) "violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return" in these circumstances. App. 20a. The court rejected petitioner's constitutional challenges in all other respects and remitted the case to the Supreme Court "for further proceedings not inconsistent with [its] decision." App. 24a.

3. On petitioners' subsequent appeal, the New York Court of Appeals on December 22, 1992, affirmed by a divided vote. App. 16a.[7] The majority held that New York may constitutionally determine a nonresident's tax by reference to income earned outside the State, whether earned by the taxpayer or by his or her spouse. App. 6a-7a. In effect, the court ruled that the due process violation found by the Appellate Division, which the State did not appeal, would be avoided notwithstanding the forced inclusion on the return of the nonresident spouse's income and its use in determining the taxpayer's tax, provided that the spouse was not required physically to sign the return.

The four-member majority asserted that the case raises "no question about which of the jointly reported income is taxable and which not; the question is how to determine the rate on income clearly subject to New York tax." App. 9a. The majority held

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7 The New Jersey State Assembly appeared in the Court of Appeals as amicus curiae supporting petitioners.

that § 601(e) is constitutional, asserting that *Maxwell v. Bugbee*, 250 U.S. 525 (1919), and *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937), permit the State to "refer to non-taxable out-of-state assets in setting their rates for taxable assets." App. 7a. "When the state levies taxes within its authority," the court said, "property not itself taxable can be used as a measure of the tax imposed" and the tax in that event "is in no just sense a tax on the foreign property." App. 8a, quoting *Maxwell v. Bugbee*, 250 U.S. at 539.

The Court of Appeals rejected petitioners' contention that *Maxwell* and *Grosjean* have been superseded by subsequent doctrinal developments in this Court's more recent decisions. The majority stated that these more recent decisions "deal[] with business taxation and interstate commerce" and "address whether a state can tax interstate corporate income in exchange for the privilege of carrying on its business." App. 8a, 9a. The court also rejected petitioners' Privileges and Immunities challenge, holding that New York does not discriminate against similarly situated taxpayers when the family's ability to pay, as reflected in its total income, is considered. App. 10a. The court did not otherwise discuss the constitutionality of New York's reference to a nonresident spouse's separate out-of-state income in fixing the rate of tax on a taxpayer's income from New York sources.

In dissent, Judge Hancock concluded that *Maxwell* and its progeny are inconsistent with this Court's modern jurisprudence and that New York's taxing scheme therefore violates the Due Process Clause. App. 11a *et seq.* Relying upon Justice Holmes' dissent in *Maxwell*, Judge Hancock explained that the 1987 amendment has the effect of imposing a tax on nonresidents' out-of-state income, "no matter how the tax is described." App. 16a. By way of amplification, Judge Hancock stated (App. 15a-16a, footnote omitted):

> Whether the [Supreme] Court will again resort to the *Maxwell*-type of labelling in order to uphold a taxing scheme—where out-of-state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income—only the Supreme Court can tell us. If the answer should be "yes", then I respectfully submit that the answer would be inimical to Justice Holmes' common sense appraisal of the tax in *Maxwell* and to the Court's recent method of analyzing state taxation Due Process problems by looking at the practical effect and the economic realities rather than "formal phrasing."

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the constitutional limitations on a state's power to tax the income of nonresidents. Given the increasing prevalence of commuter taxes in state tax regimes, this question has great practical significance. Left unresolved, it portends disharmony among the states, highlighted by the retaliatory actions that New York's neighbors have taken against the tax scheme challenged here.

1. The Due Process Clause prohibits New York from including income from outside the State in the calculation of tax due on a nonresident's income from inside New York. The challenged scheme is unconstitutional, not only because it considers the nonresident's out-of-state income in determining the tax, but also because it uses the income of someone with whom the State admittedly has no due process contact, namely the taxpayer's nonresident spouse, in fixing the tax owed by the taxpayer.

At the heart of New York's tax methodology is a myth. The State first requires nonresidents to calculate their New York tax *as*

if they were residents. Yet the reality is that they are not residents. By failing to respect the distinction in the obligations and concomitant powers of the state of domicile compared to those of all other states, New York has, in effect, improperly taxed income with which the State has no due process nexus.

Because of the plenary authority a state exercises over its own residents and the broad range of services and protection it provides them, a state may tax its residents' income irrespective of its origin. *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). As Justice Stone stated for the Court,

> A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. *These are rights and privileges which attach to domicil within the state.*

Id. at 313 (emphasis supplied).

On the other hand, a nondomiciliary state may tax income or property of a nonresident only to the extent that the thing being taxed is within the jurisdiction of the taxing state. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Moreover, to pass constitutional muster, the tax must in some sense be proportional to the services and protection rendered by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (describing due process test as "whether the taxing power exerted by the state bears *fiscal relation* to protection, opportunities and benefits given by the state") (emphasis supplied).

New York violates these time-honored constitutional principles in at least two respects. First, the challenged statute in effect taxes income earned outside the State. The impact on nonresidents of New York's 1987 amendment is exactly the same as if New York had imposed a distinct new tax on out-of-state income. In the example referred to earlier (*see* pages 3-4, above), the Pennsylvania resident is in the same economic position versus his New York counterpart that he would have occupied if New York had simply taxed his Pennsylvania-source income and that of his spouse at a rate of 5.74%.

Second, the additional New York tax imposed on nonresidents by the 1987 amendment bears no relation to any added services or protection provided by the State. The best measure of the extent to which New York has provided services and protection to justify its tax is the income actually generated by the nonresident in New York. In contrast with that person's state of residence, New York has no hand in helping the nonresident earn income elsewhere and affords no protection or services that contribute to enjoyment of the fruits of such out-of-state income.[8] The State therefore cannot justify increasing the tax on a nonresident's income merely because of the fortuity that the taxpayer and his or her spouse have additional income from outside the state. As Judge Hancock explained in dissent below (App. 16a), New York is effectively taxing that non-New York income:

> A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of

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8 *A fortiori*, New York has no greater justification for looking to the out-of-state income of the taxpayer's nonresident spouse in measuring the tax than it would have for looking to the out-of-state income of the taxpayer's parents or children. New York has provided neither the opportunity to obtain such income nor services and protection related to the use thereof.

> increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause—no matter how the tax is described. To pretend that it does not endorses a Due Process violation and works a distinct unfairness on taxpayers such as the New Jersey and Pennsylvania residents in this case.

The Court has similarly held that the validity of a state tax hinges not on "the formal language of the tax statute but rather [on] its practical effect." *Complete Auto Transit*, 430 U.S. at 279. In *Trinova Corp. v. Michigan*, 111 S.Ct. 818 (1991), for example, the Court rejected a threshold defense to the constitutionality of Michigan's single business tax (SBT), explaining (*id.* at 829):

> [L]abeling the SBT a tax on "business activity" does not permit us to forgo examination of the actual tax base and apportionment provisions. "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."

For similar reasons, New York's tax on nonresidents measured by income they earn outside the State is a tax on that out-of-state income, whatever form of words the legislature chooses to use.

What makes this scheme particularly offensive is that the burden falls exclusively on citizens who have no voice in the taxing decision and, but for the constitutional rights asserted here, no protection against it. The intended effect of § 601(e)'s methodology, in conjunction with New York's progressive rate structure, is to increase the effective tax rate applicable to the New

York income of disenfranchised nonresidents.[9] The State has raised several hundred million dollars of additional tax from the one segment of its taxpayers that had no representation in its legislature.[10]

The United States Court of Appeals for the Third Circuit has recognized that New York's statute essentially taxes non-New York income. Although rejecting under 28 U.S.C. § 1341 a federal court challenge to the tax, the court noted that the 1987 amendments "cause[d] some shifting of the tax burden to non-New Yorkers whose position as compared to New York residents is less favorable than under previous law." *Hardwick v. Cuomo*, 891 F.2d 1097, 1100 n.6 (3d Cir. 1989). This is because under the new scheme, "the same rates . . . yield more taxes from the same income than would be generated under a system not considering [nonresidents'] out-of-state income." *Id.*, at 1099. While New York residents generally benefitted from the lower tax rates enacted in 1987, from the standpoint of nonresidents "the title of the 1987 law as the Reform and Reduction Act, [was] euphe-

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9 Even were there no progressivity in rates, the methodology also effectively reduces the value to nonresidents of exemptions and deductions.

10 The due process violation created by New York is not mitigated by credit provisions in other states. The credit Pennsylvania gives its residents, for example, does not offset the full amount of additional tax paid, in this case, to New York. The credit may not exceed the Pennsylvania tax applicable to the New York-source income that New York has taxed. New Jersey and many other states impose a similar restriction on any credit they may give. *See Hardwick v. Cuomo*, 891 F.2d 1097, 1100 n.5 (3d Cir. 1989). The credit is thus extremely small in Pennsylvania, which has a relatively low income tax rate (2.1% during 1987-1990), and is non-existent in states with no income tax, such as Connecticut until recently.

mistic." *Id.* Thus, as contrasted with the tax at issue in *Trinova Corp.*, *supra*, the tax scheme challenged here unquestionably "export[s] tax burdens and import[s] tax revenues." 111 S.Ct. at 829.

2. New York also violates due process of law by taxing one person, a nonresident taxpayer, in part on the basis of income belonging to another person, the taxpayer's nonresident spouse, with whom the State lacks any due process contact. The State persists in including spousal income in the taxing formula even though it now admits—having declined to appeal the Appellate Division's due process ruling in petitioners' favor—that it has no nexus with the spouse or with the income the spouse earns outside New York. We are aware of no other instance where a court has upheld the constitutionality of such a scheme.

The Court of Appeals theorized that New York can constitutionally compel a married nonresident taxpayer to use the couple's combined income in calculating the former's New York tax by reason of the family's overall "ability to pay." App. 7a. This rationale is wholly unconvincing as applied to a person outside the state's taxing jurisdiction. New York admits that it has no due process contacts with the nonresident spouse and cannot compel the spouse to join the taxpayer's return. That being so, the Due Process Clause makes the spouse's "ability to pay" impermissible as a determinant of the taxpayer's tax.

The reality is that the spouse's income is not the taxpayer's income. The filing of a joint federal tax return does not convert the separate incomes of each spouse into joint property of both. *In re Wetteroff*, 453 F.2d 544, 547 (8th Cir.), *cert. denied*, 409 U.S. 934 (1972) ("Congress most definitely did not intend [26 U.S.C.] § 6013(a) to affect or change the ownership of property rights between taxpayers."); *Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521 (Pa. 1947) (statute violated due process by converting

separate income of each spouse into community property of both). New York therefore denies due process of law by measuring the tax on a nonresident's income by the separate and unrelated income of that person's nonresident spouse.

3. In sustaining the challenged tax, the majority in the court below relied principally upon *Maxwell v. Bugbee*, 250 U.S. 525 (1919), and its limited progeny. That was error for at least three reasons. First, *Maxwell* involved a privilege tax, not a tax on income. Second, even if *Maxwell* could constitutionally be extended to income taxes, it cannot possibly justify taxing spousal income with which the State concededly lacks due process nexus. Third, however *Maxwell* is construed, that case is inconsistent with the Court's modern jurisprudence and should be confined to its facts if not overruled.

In *Maxwell* the Court considered the constitutionality of a New Jersey graduated tax on the privilege of inheriting, from a nonresident decedent, property located in the state. The tax was assessed by first calculating what the tax would be if applied to the entire estate, and then multiplying that tax by "the proportion which the specified local property bears to the entire estate of the decedent." *Maxwell*, 250 U.S. at 539. The five-justice majority held that this mode of computation did not violate the Due Process Clause (*id.* at 539-540):

> The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. . . . To say that to apply a different rule regulating succession to resident and nonresident decedents is to levy a tax upon foreign estates is to distort the statute from its purpose to tax the privilege [of inheritance], which the statute has created.

> into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it.

In short, the Court rested its determination upon the form of the tax as one on the privilege of inheritance, as distinguished from a tax imposed directly on property.

Justice Holmes, joined by three other justices, dissented. He explained (250 U.S. at 544):

> New Jersey cannot tax the property of [the decedents] outside the state, and cannot use her power over property within it to accomplish by indirection what she cannot do directly. It seems to me that that is what she is trying to do, and therefore that the judgment of the court of errors and appeals should be reversed.
>
> It seems to me that when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other states.

Maxwell is inapposite here because it involved neither a tax specifically on income nor a tax more generally on property. Quite the contrary, the key to the majority's reasoning was that the state had imposed a privilege tax that could properly be measured by the proportion of the privilege exercised in the state. New York, by contrast, has imposed a tax not on a privilege at all but directly on a species of property—"taxable income which is derived [by nonresidents] from sources in this state." Tax Law

§ 601(e). The tax should therefore be measured solely by the thing being taxed: the income from New York sources.

Second, even if *Maxwell* permitted New York to look to the nonresident's out-of-state income in calculating his tax, the decision in no way supports sweeping the non-New York income of the taxpayer's nonresident spouse into the tax calculation. The spouse is a separate person, and his or her income is not the property of the taxpayer even if they file a joint federal tax return. It is only the couple's federal tax return that is joint, not the income reported on the return.

In any event, *Maxwell* is no longer good law. It is premised upon a formalistic analysis of the state tax rather than an appraisal of its economic substance. In the intervening seven decades, the Court's Due Process and Commerce Clause jurisprudence has repeatedly rejected a focus upon a tax's form, looking instead to economic realities and the practical effects of the tax. For example, in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the Court overruled three prior cases, stating that in the Court's "more recent decisions," it has "rejected th[e] somewhat metaphysical approach" of "focus[ing] on the character of the privilege [being taxed] rather than the practical consequences of the tax." 483 U.S. at 294-95 (footnote omitted). Similar reasons underlay *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), which overruled *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Western & Southern Life Ins. Co. v. Bd. of Equalization*, 451 U.S. 648 (1981), which overruled *Lincoln National Life Ins. Co. v. Read*, 325 U.S. 673 (1945); and *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), which overruled *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). *See Trinova Corp.*, 111 S.Ct. at 828 (noting that due process principles are comprised within the *Complete Auto Transit* analysis). As the dissent recognized below, the "significance [of these cases] is not their specific holdings but the methodology employed by the Court

in analyzing the statutes: *i.e.*, looking to the practical effect and economic realities of the tax in issue." App. 12a n.1.

Maxwell, on the other hand, was a five-to-four decision in which the Court focused upon the form of the tax as a "privilege" rather than a "property" tax. The Court itself long ago questioned the decision in that case. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1925) (*Maxwell* "is on the borderline, as is evidenced by the dissent of four members of the court"). *Maxwell* has rarely been cited by the Court and repeatedly been criticized by commentators.[11] As the dissent below recognized, it is Justice Holmes's dissent in *Maxwell* that points the way to the Court's modern jurisprudence (App. 14a):

> Consistent with Justice Holmes' pragmatic approach, in the past half century, the Supreme Court has moved away from earlier reliance on the *Maxwell*-type of formalism and embraced a method of analysis based on "the practical effect of a challenged tax" . . . and on "economic realities" rather than "formal phrasing."

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11 Professor Lowndes in 1936 found it difficult "to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation." C.L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 HARV. L. REV. 756, 770 (1936). A leading contemporary commentator has criticized *Maxwell* as being based on "dubious logic." W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. 1309, 1317 n.53 (1974). Moreover, the only decision in this Court to follow *Maxwell—Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937)—was also decided by a narrow vote (4 to 3) and has been described as "primarily involving the states' police power to regulate the growth of chain stores." Hellerstein, *supra*, 72 MICH. L. REV. at 1317 n.53.

The Court of Appeals plainly failed to adopt this pragmatic approach here.[12]

Even though *Maxwell* has been criticized and is contrary to the Court's more modern decisions, a handful of state courts that have looked at tax methodologies similar to New York's have

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12 In citing *Maxwell* for the proposition that "property not itself taxable can be used as a measure of the tax imposed upon property within the State" (App. 8a), the Court of Appeals again departs from the reasoning of this Court's modern cases. The "measurement of income" rationale is a mainstay of this Court's decisions involving the apportionment of a corporation's "unitary business" income. *See, e.g., Allied-Signal, Inc. v. Director, Division of Taxes*, 112 S.Ct. 2251 (1992). These decisions regularly explain that a state properly may use out-of-state income as one component in a formula designed to measure what a corporation's in-state income *is*. Once the state's apportioned share of the unitary income is determined, the state applies its ordinary corporate rates thereto to determine the tax. This type of "measurement" rationale is plainly inapplicable here. There is no uncertainty whatever about what petitioners' New York source income is. New York is not simply using out-of-state income in an apportionment formula; it requires nonresidents to compute *a tax* on their out-of-state income, then apportions part of *the tax* to New York. Rather than limiting apportionment to determination of the income subject to tax, New York is unconstitutionally apportioning a tax that petitioners' domiciliary states alone are entitled to levy. New York thereby subjects nonresidents to higher marginal tax rates than are borne by residents with identical New York source income, a discriminatory effect that does not occur where corporate income is apportioned by formula.

relied, erroneously, on the *Maxwell* line of cases.[13] A decision that is "borderline" at best should not be left standing, especially where it continues to serve as precedent impinging on the constitutional rights of a significant number of people who, at the same time, are excluded from the political process.

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13 In *Wheeler v. State*, 249 A.2d 887 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), and *Wheeler v. State*, 253 A.2d 136 (Vt.), *appeal dismissed*, 396 U.S. 4 (1969), the court applied *Maxwell* without addressing the distinction between a privilege tax, as in *Maxwell*, and the income tax at issue. The *Wheeler* cases were decided eight years before this Court overruled *Spector Motor Service* in *Complete Auto Transit*; and they involved a single taxpayer, so that no issue concerning spousal income was presented. The court in *Stevens v. State Tax Assessor*, 571 A.2d 1195 (Me.), *cert. denied*, 111 S.Ct. 65 (1990), blindly followed *Wheeler* concerning the applicability of *Maxwell* and did not consider this Court's intervening decisions in *Complete Auto Transit*, *Commonwealth Edison*, *Western & Southern Life*, or *American Trucking*. Although the returns at issue in *Stevens* were jointly filed by the nonresident taxpayer and his nonresident wife, the case did not concern a constitutional challenge to the inclusion of spousal income in the apportionment calculation, since the taxpayer had the option under Maine's statute to file either individually or jointly. ME. REV. STAT. ANN. tit. 36, § 5221(2). *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), was a Supremacy Clause decision concerning § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574. The court referred to *Maxwell* and *Great Atlantic & Pacific Tea Co.* merely to reflect that Congress was aware, when it enacted the Act, of the tax methodology at issue here. The court did not rule on the constitutionality of the methodology. *Cf. Aronov v. Secretary of Revenue*, 371 S.E.2d 468 (N.C. 1988) (nonresident required to reduce in-state partnership net operating loss by amount of other out-of-state income).

4. The decision of the Court of Appeals also conflicts with prior decisions of the Court concerning the Privileges and Immunities Clause. It states:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This clause entitles the citizens of each state in the Union to enjoy in every other state all of the privileges and immunities which that second state accords its own citizens. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

In the early case of *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870), the Court explained that the term "privileges and immunities" is to be afforded a "very comprehensive meaning," specifically including the right "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." Thus, under the Privileges and Immunities Clause, the Court will strike down as unconstitutional a state taxing scheme unless it in fact provides "substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers." *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975). *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (invalidating a New York tax statute that denied to nonresidents an exemption from income taxation that New York provided to its residents).

The statute challenged here clearly discriminates against nonresidents. Its methodology has the net effect of reducing the value to nonresidents of exemptions and deductions, the full value of which is available to residents. Under § 601(e), a nonresident

receives only that proportion of the benefit of exemptions and deductions as is reflected in the apportionment formula.[14]

The statute is likewise discriminatory in that it permits a resident who is married to a nonresident the option of filing a separate return—based solely upon the resident's income—while denying that option to a nonresident who is married to a nonresident. By such disparate treatment that uniformly disadvantages nonresidents, New York has failed "'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988), *quoting Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).[15]

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14 A leading commentator on state taxes has explained, "Since the amount of income a resident earns plays no role in determining whether he receives a full exemption, it should not play any role in determining whether a nonresident receives a full exemption." W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. at 1343.

15 New York's refusal to permit a married nonresident taxpayer to file a separate return reflecting his or her sole income is partially responsible for the due process violation discussed earlier. For a brief period following the Appellate Division's due process ruling in petitioners' favor, the Department of Revenue took the position that the Appellate Division decision mandated offering a "separate filing" option to nonresident taxpayers whose nonresident spouses had no New York income. After the decision of the Court of Appeals, however, the Department abrogated that approach, requiring such nonresidents to report the federally reported joint data, although exempting the spouse from being required actually to sign the New York return.

5. The question presented is extremely important in a practical sense. At least nine states now tax nonresidents based upon the jointly reported incomes of the taxpayer and his or her spouse.[16] Routinely, they achieve this result through the interaction of the requirements that: (1) taxpayers must first calculate a tax on their income from all sources, which tax is then "apportioned"; and (2) married nonresidents who file a joint federal return must also file a joint state return, even when one spouse has no due process contacts whatever with the taxing state.[17] At least five additional states require taxpayers to employ the "apportionment" calculation above, while granting nonresidents the option to file a separate or a joint return.[18] Thus, a significant number of states, albeit a minority, employ tax methodologies similar to the one at issue here.

The constitutional question here is significant and growing in its importance to the field of state taxation. Professor Hellerstein has written that the tax status of the nonresident taxpayer today "is often characterized by uncertainty, unfairness, and considerable confusion."[19] New York's 1987 amendment and similar recent

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16 In addition to New York, at least Colorado, Kansas, Minnesota, Missouri, Nebraska, Ohio, Rhode Island, and Utah require joint filing.

17 This compulsory joint state filing was invalidated as to New York on due process grounds by the Appellate Division. App. 20a. The State did not appeal that ruling.

18 The additional states are California, Iowa, Maine, Vermont, and Virginia.

19 W. Hellerstein, *Some Reflections on the State of Taxation of a Nonresident's Personal Income*, 72 MICH. L. REV. at 1311.

legislation in other states have merely compounded the uncertainty, unfairness, and confusion.

Unless the decision below is reviewed, the number of states using New York's approach can be expected to grow. In the current economic environment, states are seeking politically expedient ways to increase their revenues to cover budget shortfalls resulting from the recent recession. New York's approach, if left standing, will encourage other states to reach beyond their borders in an effort to increase tax revenues at the expense of commuters and other persons who do not vote in the state. Such taxes have considerable revenue potential. New York's scheme for taxing nonresidents, estimated in 1989 to raise $50 million per year, has apparently yielded $80 million in additional tax annually, and comparable legislation currently being considered by New Jersey would raise an estimated $27 million per year.[20] The number of people affected by such taxes is substantial: approximately 460,000 nonresidents pay income taxes to New York alone.

The question presented is also important in an institutional sense. If states are successful in raiding their neighbors' coffers, the risk of retaliatory taxation and other measures detrimental to comity among the states is quite substantial. Indeed, the risk of a tax war has been amply realized in this case.

The Commonwealth of Pennsylvania expressed its concern by appearing before the Appellate Division in this case as amicus curiae supporting petitioners. Following New York's 1987 amendment of its law, the members of the New Jersey Assembly sued unsuccessfully in federal court to enjoin the new scheme of nonresident taxation. *See Hardwick v. Cuomo*, 891 F.2d 1097 (3d Cir. 1989). In June 1989, Governor Cuomo wrote Governor Kean

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20 *See* N.Y. Times, Feb. 16, 1989, at A1; *State Tax Notes* 708 (Mar. 29, 1993).

of New Jersey to advise him that changes to the New York tax law would soon be proposed, conceding that there are "elements of our massive tax reform program which we believe to be unfair to our nonresident taxpayers" and that further changes would be required before New York could be said to "treat nonresident taxpayers as fairly as we treat our own residents."[21] No such changes were ever made, and the New Jersey Assembly subsequently appeared before the Court of Appeals in this case as amicus curiae supporting petitioners. Since then, both houses of the New Jersey Legislature have passed bills that "retaliate against New York's tax on nonresident commuters" by adopting a similar methodology. *State Tax Notes* 708 (Mar. 29, 1993). Significantly, the New Jersey Senate also passed a bill which would rescind the new retaliatory tax if New York were to repeal the statute challenged in this case. *Id.*

The question presented here is also of importance to the Federal Government and to our military personnel stationed around the Country. In *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), the Tenth Circuit was called upon to interpret § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 574, which forbids a state to tax military pay earned by nonresident service personnel stationed in the state. Relying on *Maxwell v. Bugbee*, the court held that Kansas could nevertheless include military pay in an income tax formula similar to New York's, rejecting the Federal Government's arguments to the contrary.

This case presents an appropriate and necessary occasion for the Court to remove, or restrict, a decision of dubious continuing value. *Maxwell* was decided nearly three-quarters of a century ago. The economy, the mobility of workers, and the tax structure

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21 Letter, Hon. Mario M. Cuomo to Hon. Thomas H. Kean, dated June 6, 1989, an exhibit before the trial court (page 206 *et seq.* in the Consolidated Record on Appeal before the Court of Appeals).

have greatly changed since 1919. State income taxes, not to mention commuter taxes, were uncommon when *Maxwell* was decided; and the frequency of both spouses working outside the home has increased dramatically since that time. The willingness of some state courts to rely upon *Maxwell*'s outmoded logic warrants its express reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: April 21, 1993

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . .

The Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Pertinent Portions of Section 601(d) of the New York Tax Law:

> Tax on certain unearned income. (1) For taxable years beginning after nineteen hundred eighty-six and before nineteen hundred eighty-nine, there is hereby imposed for each taxable year on the New York unearned income of every resident individual who has New York adjusted gross income in excess of one hundred thousand dollars, other than a resident married individual who makes a separate return under sub-section (b) of section six hundred fifty-one, a tax computed as follows. Multiply the New York unearned income of such individual by a rate determined by multiplying the applicable percentage set forth in paragraph three of this subsection by a fraction the numerator of which is the lesser of one hundred thousand dollars or the excess of such taxpayer's New York adjusted gross income over

one hundred thousand dollars and the denominator of which is one hundred thousand dollars.

* * * *

(3) The applicable percentage is, for taxable years beginning in nineteen hundred eighty-eight, two percent and for taxable years beginning in nineteen hundred eighty-seven, three percent.

* * * *

(8) For purposes of this subsection, the New York unearned income of a nonresident shall be computed using only those items derived from or connected with New York sources.

Pertinent Portion of Section 601(e) of the New York Tax Law:

Nonresidents and part-year residents. (1) There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual and trust and every nonresident estate a tax which shall be equal to the tax computed under subsections (a) through (d) of this section, as the case may be, reduced by the credits permitted under subsections (b) and (c) of section six hundred six, as if such nonresident or part-year resident individual, estate or trust were a resident, multiplied by a fraction, the numerator of which is such individual's, estate's, or trust's New York source income determined in accordance with part III of this article and the denominator of which is such individual's, estate's or trust's federal adjusted gross income for the taxable year . . . .

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

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3 No. 277
Lawrence J. Brady, et al.,
Appellants, OPINION

v.

The State of New York, et al.,
Respondents.

[Decided December 22, 1992]

David H. Weinstein, for appellants.
Daniel Smirlock, for respondents.
New Jersey State Assembly, amicus curiae

KAYE, J.:

Plaintiffs Lawrence Brady and Barbara Brady are married and reside in New Jersey. Plaintiffs Deborah Labovitz and Judah Labovitz are married and reside in Pennsylvania. At all relevant times, Lawrence Brady and Deborah Labovitz earned income in New York, and Barbara Brady and Judah Labovitz earned income outside New York; in addition, the Labovitzes had a combined adjusted gross income of more than $100,000 and received unearned income from non-New York sources. Both couples filed joint federal tax returns. Plaintiffs challenge New York's method of determining the nonresident tax on income earned in New York, whereby New York takes into account both New York and non-New York source income in calculating the tax rate to be applied to New York income.

The laws at issue are Tax Law §§601(d) and 601(e), sections of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28) (TRARA). Under Tax Law §601(e)(1), the tax of a nonresident is first calculated "as if the taxpayer were a resident." Thus, the nonresident's tax base (as that term is used by the parties) is determined by applying the appropriate graduated rate in Tax Law §601[a]-[c] to the taxpayer's total income from all sources (less any statutory deductions and exemptions [Tax Law §§606, 611[a]]).[1] the taxpayer's total income is derived from "New York adjusted gross income" (Tax Law §611[a]), which is determined by reference to the taxpayer's "federal adjusted gross income" (Tax Law §612).

Residents pay their entire tax base. For nonresidents, however, the amount is reduced by the percentage of income earned in New York compared to total income (Tax Law §601[e][1]). Therefore, while residents and nonresidents with the same total income are taxed at the same rate, the nonresident pays tax only on the percentage of income attributable to New York.

Assuming, for example, an effective tax rate of 6% for incomes of $25,000 or less, and an effective tax rate of 7% for incomes above $25,000, a resident with total income of $50,000 would have a tax base of $3,500 and would pay that amount. So

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1. In the trial court and Appellate Division, plaintiffs also challenged Tax Law §651(b)(2), which required married nonresidents to file a joint nonresident tax return in New York if they filed a joint federal return. The Appellate Division found this provision unconstitutional, as it exposed a nonresident spouse with no New York connections to civil and criminal liability in New York by virtue of that spouses's signature on the State tax return. The State has not appealed that determination. the question before us—whether in fixing the tax rate, New York can refer to spousal income included in the total adjusted gross income on the couple's joint federal return—is unaffected by that holding.

would a nonresident with the same income entirely attributable to New York sources. However, a nonresident with $25,000 of New York income and $25,000 of non-New York income, while having the same $3500 tax base, would pay half that amount—$1750—because only half of the income would be subject to the New York tax.

In addition, in 1988 only, the taxpayer's effective rate was increased with reference to unearned income if the taxpayer had New York adjusted gross income over $100,000 (Tax Law §601[d]). Thus, the hypothetical resident taxpayer with a total 1988 income of $110,000, including total unearned income of $10,000 from non-New York sources, would have an initial tax base of $7700. That tax base would be increased by $20, which is derived by multiplying $10,000 by 2% and then multiplying the resulting figure of $200 by (110,000-100,000)/100,000. A resident with such income would be liable for a tax of $7720. A nonresident, however, would pay only $7025, since the nonresident's tax based would be apportioned by the percentage of New York income (here 100,000/110,000 or 91%).

Plaintiffs challenge this tax scheme, complaining that New York unconstitutionally disadvantages nonresidents. They urge us not to compare residents and nonresidents of the same total income, but to look only to New York income in reviewing the legality of the tax rate. Thus, plaintiffs argue, the same tax rate must apply to a resident with total income of $25,000 and a nonresident with new York income of $25,000 regardless of the nonresident's total income reported on the tax return.

Plaintiffs seeks a declaration, for themselves and a class of similarly situated persons, that these provisions violate due process because presumably higher taxes arising from higher tax rates demonstrate that New York is in effect impermissibly taxing out-of-state income. They also claim the scheme violates the constitutional Privileges and Immunities and Equal Protection Clauses since a New York resident having no income other than

New York earnings may pay a lower tax than a nonresident with the same New York earnings who has additional income from other sources.

Supreme Court denied plaintiffs' motion for class certification and granted defendants' motion for summary judgment dismissing the complaint. The Appellate Division modified by declaring Tax Law §651(b) unconstitutional and remitting for further proceedings on that issue, but otherwise affirmed. On plaintiffs' appeal from the Appellate Division order, we now affirm.[2]

I.

Plaintiffs first claim that by setting tax rates with reference to adjusted gross income, New York taxes non-New York income, thus taking property in violation of due process. They point to three instances: (1) income of the nonresident taxpayer earned outside New York and included on the taxpayer's federal return; (2) income of the nonresident spouse earned outside New York and included on the taxpayer's joint federal return; and (3) for 1988 only, unearned out-of-State income referenced for purposes of the §601(e) surcharge on those with a total adjusted gross income over $100,000. Each of these is included in the tax base solely for purposes of rate determination. Thus, the inquiry with respect to

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2. Our decision on the merits renders it unnecessary to address the denial of class action status insofar as it relates to the claims at issue on this appeal. With respect to the Appellate Division's determination that §651(b)(2) is unconstitutional—which is not before us on the merits—both the motion court and the Appellate Division found plaintiffs had not met their burden of establishing that the proposed class action would be superior method for determining the controversy, pointing particularly to notification burdens weighed against speculative allegations of injury to the putative class. We see no reason to overturn that conclusion.

each category is the same: in these circumstances, is out-of-state income being impermissibly taxed?

We start with the proposition that legislative enactments enjoy a presumption of constitutionality (Montgomery v Daniels, 38 NY2d 41, 54). States, of course, have the power to tax nonresidents on income derived from sources within their borders (Travis v Yale & Towne Mfg Co, 252 US 60, 75; Shaffer v Carter, 252 US 37, 52). Similarly, progressive tax systems, which apportion the tax burden based on the taxpayer's ability to pay, are unquestionably constitutional (Brushaber v Union Pacific, 240 US 1, 25), and indeed are "widespread in the United States and imbedded in the federal tax structure" (Wheeler v Vermont, 249 A2d 887, 890 [Vt], appeal dismissed for want of a substantial federal question 396 US 4[3]).

It has long been the rule that states may refer to non-taxable out-of-state assets in setting their rates for taxable assets (see Great Atlantic and Pacific Tea Co v Grosjean, 301 US 412; Maxwell v Bugbee, 250 US 525). Maxwell involved a New Jersey inheritance tax that required the inclusion of the entire estate of the decedent, wherever located, to determine the rate by which the New Jersey property would be taxed. The actual tax was calculated, as here, by applying the rate applicable to the entire estate, but then reducing the tax to reflect only the percentage of the estate located in New Jersey. The United States Supreme Court found the statute constitutional, holding:

> The subject matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of

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3. Dismissal for want of a substantial constitutional question operates as a decision on the merits (see, Washington v Yakima Indian Nation, 439 US 463, 476 n20).

> the tax imposed * * * In the present case, the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent * * * It is in no sense a tax upon the foreign property.

(Id. at 539.) Similarly, in Grosjean, the Supreme Court upheld a Louisiana license tax on in-state chain stores that was calculated on the basis of the taxpayer's nationwide operation, stating "[i]n legal contemplation, the state does not lay a tax upon property lying beyond her borders * * * " (id. at 425).

Since Maxwell and Grosjean, high courts in other states have upheld tax schemes similar to the one at issue here. (See, Stevens v State Tax Assessor, 571 A2d 1195 [Me], cert denied 111 S Ct 65; Wheeler v State, 249 A2d 887, supra; cf. United States v Kansas, 810 F2d 935 [10th Cir] [upholding validity of including nonresident military income--which was not taxable by state--in determining state tax rate]; Aronov v Secretary of Revenue, 371 SE2d 468 [NC] [upholding requirement that nonresident taxpayer reduce net operating loss from NC partnership by amount of out-of-state income], cert denied 489 US 1096.)

As in Stevens and Wheeler, the subject matter here regulated is a tax on in-state income, which is within the jurisdiction of the State. When the state levies taxes within its authority, "property not itself taxable can be used as a measure of the tax imposed upon property within the State and * * * to do so 'is in no just sense a tax on the foreign property.'" (United States v Kansas, 810 F2d at 938, supra [quoting Maxwell v Bugbee, 250 US at 539, supra].)

Plaintiffs' contention that Maxwell and Grosjean have been superseded by Supreme Court cases dealing with business taxation and interstate commerce is without basis. Those cases address the

constitutionality of directly taxing multi-state corporate income, which turns upon whether such income is attributable to a "unitary" business with a sufficient nexus in the taxing state to justify the exercise of the state's taxing authority. In Allied-Signal, Inc v Director, Division of Taxation (60 USLW 4554 [June 15, 1992]), for example, the issue was whether New Jersey could tax the capital gain realized by a non-New Jersey company on the sale of a New Jersey company. Similarly, Complete Auto Transit, Inc v Brady (430 US 274) and its progeny address whether a state can tax interstate corporate income in exchange for the privilege of carrying on its business. As even the dissent acknowledges (dissent p 3, n1), neither line of cases controls the present issue. Here, there is no question about which of the jointly reported income is taxable and which not; the question is how to determine the rate on income clearly subject to New York tax.

Thus, plaintiffs' due process challenge was correctly rejected by the courts below.

II.

Plaintiffs' alternative contention—an undifferentiated argument under the constitutional Privilege and Immunities and Equal Protection Clauses—also was properly rejected: TRARA treats similarly situated residents and nonresidents the same.

The Privilege and Immunities clause of the United States Constitution was designed "'to place the citizens [including residents] of each State upon the same footing with citizens [and residents] of other States, so far as the advantages resulting from citizenship in those states are concerned.'" (Supreme Court of Virginia v Friedman, 487 US 59, 64, quoting Paul v Virginia, 8 Wall 168, 180; see also, Austin v New Hampshire, 420 US 656.) Pursuit of an occupation outside one's home state is certainly a right protected by this clause (see, Hicklin v Orbeck, 437 US 518, 524-525; Austin v New Hampshire, 420 US 656, Toomer v Witsell, 334 US 385, 396). However, to establish an unwarranted

burden on their privileges and immunities, plaintiffs must demonstrate disadvantage as against others in a similar position (Stevens v State Tax Assessor, 571 A2d at 1195, supra; Wheeler v State of Vermont, 249 A2d at 891, supra). This they have failed to do. (Compare, Austin v New Hampshire, 420 US 656 [taxing nonresidents but not residents violates privileges and immunities]; Spencer v South Carolina Tax Commission, 316 SE2d 386 [SC] [statute that denied certain deductions only to nonresidents violated privileges and immunities], aff'd by an equally divided Court 471 US 82.)

Plaintiffs would have us compare them to New York residents with a total income equivalent to plaintiffs' New York income alone. Plaintiffs would urge, for example, that a nonresident earning $20,000 in New York, but with reported income of $100,000, should be taxed at the same rate as a resident with an income of $20,000. But plaintiffs' hypothetical taxpayers are not similarly situated in terms of ability to pay. Similarly situated taxpayers are those with the same total income.

Again, plaintiffs have failed to establish that the challenged tax is unconstitutional.

III.

Plaintiffs' real quarrel, in the end, is with the graduated tax. A system of progressive taxation apportions the tax burden based on ability to pay—higher income taxpayers can pay more and are therefore taxed at a higher rate than lower income taxpayers. This system does not implicate the State or Federal Constitution so long as the rates are applied, as here, in a nondiscriminatory manner and only to taxable New York income.

Finally, we note that the dissent is flawed not only in its reliance on recent Supreme Court decisions dealing with corporate tax (see, pp 8-9, supra), but also in its claim to logic, common sense and economic reality. In fact, those considerations—as well

as precedent—support the challenged tax, which has the practical effect of equalling tax rates among persons whose total incomes, as reported to taxing authorities, are the same.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

HANCOCK, J (dissenting):

No state may impose a tax on income earned outside of the state by a nonresident. That is settled constitutional law. Under the statute at issue, New York considers income earned outside of the State for purposes of determining the rate at which it will tax a nonresident's New York income. Because New York has a progressive tax rate structure, the result of including the out-of-state income is a higher tax rate and a higher tax on the New York income. The question in this case is whether by considering the nontaxable out-of-state income in determining the tax rate on the New York income, the State is, in reality, taxing the out-of-state income and doing indirectly what it cannot do directly.

The answer to the question, of course, is the one dictated by logic and common sense: the State is taxing the outside income. Including it results in a higher tax bracket and the nonresident pays more tax on the New York income. But, the State maintains that this is not so. There is a distinction, it says, which "is straightforward and obvious. State taxes on nonresidents may be measured by income outside the state as long as they are not imposed on such income" (Respondents' brief, at 17 [emphasis added]).

While the claimed distinction between taxing out-of-state income and using it as a measure of the tax that is ultimately imposed hardly seems "straightforward" or "obvious", my

colleagues are apparently content with it and find satisfactory precedent in two decisions of the Supreme Court -- one handed down seventy-three years ago, Maxwell v Bugbee (250 US 525), and the other fifty-five years ago, Great Atlantic & Pacific Tea Co. v Grosjean (301 US 412). I believe that these decisions do not control this case. They do not reflect the Supreme Court's express rejection of labelling and formalism and its adoption instead of economic reality as the current approach to problems involving state taxation of out-of-state income of nonresidents (see, e.g., Mobil Oil Corp. v Commissioner of Taxes, 445 US 425, 440-441; Complete Auto Transit, Inc. v Brady, 430 US 274, 279).[1] For this reason, I respectfully dissent.

The case of Maxwell v Bugbee (250 US 524)—the basis of the Attorney General's "straightforward and obvious" distinction between measuring a tax on out-of-state income and taxing out-of-state income—was decided in 1919 by a vote of five to four.[2] The Maxwell majority, adopting the more formalistic approach of that time, dismissed the due process objection to the inclusion of out-of-state property in determining the tax on the privilege of transferring property within the state. It simply announced,

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1. That these cases address the extraterritorial reach of corporate taxes, as the majority notes (Maj opn, at 8), is of no moment. Their significance for present purposes is not their specific holdings but the methodology employed by the Court in analyzing the statutes: i.e., looking to the practical effect and economic realities of the tax in issue.

2. Great Atlantic & Pacific Tea Co. v Grosjean (301 US 412), involving a chain store tax based on the total number stores in the chain, is cited by the majority but is not discussed in the opinion. It adds nothing to the argument (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan Law Review 1309, 1317 n 53 [Grosjean "may be viewed as a case primarily involving the state's police power to regulate the growth of chain stores"]).

without explanation of its reasoning, that the inclusion of the out-of-state property does not result in a tax on it, but "merely affords a measure of the tax imposed" (Maxwell, supra, at 535).

The soundness of the Maxwell decision has been questioned by the Court itself (see, Frick v Pennsylvania, 268 US 473, 495 [Maxwell "is on the borderline, as is evidenced by the dissent of four members of the Court"]; see also, Hellerstein, Some Reflections On the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1317 n 53 [Maxwell riddled with "dubious logic"]; Lowndes, Rate and Measure in Jurisdiction To Tax—Aftermath of Maxwell v Bugbee, 49 Harv L Rev 756, 770 [it is difficult "to imagine anything more iniquitously unfair than the application of the Maxwell formula to income taxation"]).

Justice O. W. Holmes, Jr., viewing the substance of the statue in Maxwell and its effect on the taxpayer with the frank realism for which he was noted,[3] dissented. Joined by Chief

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3. See, e.g., Holmes, Path of the Law, 10 Harv 1 Rev 457; Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought, 66 Cornell L Rev 861, 866-869; Frank, Mr. Justice Holmes and Non-Euclidean Legal Thinking, 17 Cornell Law Quarterly 568; Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 Northwestern Univ L Rev 541; Lyons, Legal Formalism and Instrumentalism, 66 Cornell L Rev 949 (Professor Lyons writes at p. 949: "Holmes and those who followed in his wake believed they were rejecting a frigid and impoverished conception of the law [often called 'formalism'] which had, in their view, adversely affected judicial practice. They spawned a collection of doctrines that Professor Summers dubs 'pragmatic instrumentalism'—fittingly so-called both because they viewed the law as an eminently practical instrument and because they were so strongly influenced by the philosophical pragmatists William James and John Dewey").

Justice White and Justices VanDevanter and McReynolds, Justice Homes wrote:

> It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used. It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States (Maxwell, supra, at 544 [Holmes, J., dissenting] [emphasis added]).

Consistent with Justice Holmes' pragmatic approach, in the past half century, the Supreme Court has moved away from its earlier reliance on the Maxwell-type of formalism and embraced a method of analysis based on "the practical effect of a challenged tax" (Mobil Oil Corp, supra, at 443) and on "economic realities" rather than "formal phrasing" (Complete Auto Transit, supra, at 278-280 [overruling Spector Motor Service v O'Connor, 340 US 602, which had deemed "irrelevant any consideration of the practical effect of the tax"]; see also, Allied-Signal, Inc. v Director, Division of Taxation, 60 USLW 4554, 4556; ASARCO v Idaho State Tax Commission, 458 US 307, 319; Exxon v Wisconsin Dep't of Revenue, 447 US 207, 223-224; Wisconsin v JC Penny Co., 311 US 435, 444).

If the tax in question is analyzed with the candor employed by Justice Holmes in his Maxwell dissent and by the Supreme Court in its recent decisions, there can be no question that the practical effect of including out-of-state for the purpose of increasing the rate on the in-state income is a tax on the out-of-state income. The majority does not dispute this proposition. Instead, it cites state cases, which, with no explication, have accepted the Maxwell procedure of deciding by labelling (see, Maj Opn, at 7 [citing Stevens v State Tax Assessor, 571 A2d 1195

(Me); Wheeler v Vermont, 249 A2d 887 (Vt)]). That Vermont and Maine have cited Maxwell with approval, of course, does not mean that the decision is regarded with favor by the Supreme Court.[4] The Vermont Supreme Court, it should be noted, decided Wheeler in 1969, prior to the Supreme Court cases expressly renouncing the formalistic approach. In Stevens, the Supreme Court of Maine merely followed Wheeler in its uncritical acceptance of Maxwell. Whether the Court will again resort to the Maxwell-type of labelling[5] in order to uphold a taxing scheme—

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4. Indeed, the decision in Wheeler does not address the issue of whether out-of-state income is a permissible consideration in setting the rate of tax on in-state income (see, Hellerstein, Some Reflections on the State Taxation of a Nonresident's Personal Income, 72 Michigan L Rev 1309, 1318). The decision, as far as it concerned due process, addressed only whether the Vermont had in fact taxed Wheeler's out-of-state income.

5. Avoiding a due process challenge by proclaiming that the statute "merely affords a measure of the tax imposed" as in Maxwell is the sort of formalism in the decision-making which the Court repudiated in J.C. Penny (supra):

> [T]he descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." Henderson v Mayor of New York, 92 US 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with the practical operation, not its definition or the precise form of descriptive words which may be applied to it." Lawrence v State Tax Commission, 268 US 276, 280 (Wisconsin v J.C. Penny Co., 311 US at 443-444).

where out-of-state income of the taxpayer and the taxpayer's spouse is used to increase the tax on the taxpayer's in-state income —only the Supreme Court can tell us. If the answer should be "yes", then I respectfully submit that the answer would be inimical to Justice Holmes' common sense appraisal of the tax in Maxwell and to the Court's recent method of analyzing state taxation Due Process problems by looking at the practical effect and the economic realities rather than "formal phrasing" (Complete Auto Transit, supra, at 280; see e.g., Mobil Oil Corp., supra at 443). A statute which includes out-of-state income of the taxpayer and the taxpayer's spouse for the purpose of increasing the tax on the in-state income and which results in such increase imposes a tax on the out-of-state income in violation of the Due Process clause—no matter how the tax is described. To pretend that it does not endorses a Due Process violation and works a distinct unfairness on taxpayers such as the New Jersey and Pennsylvania residents in this case.

* * * * * * * * *

Order affirmed, with costs, and certified question answered in the negative. Opinion by Judge Kaye. Judges Titone, Bellacosa and Smith concur. Judge Hancock dissents and votes to reverse in an opinion. Acting Chief Judge Simons took no part.

Decided December 22, 1992

APPENDIX C

Lawrence J. Brady et al., Appellants, v State of New York et al., Respondents.

N.Y. Appellate Division, Third Department, November 27, 1991

[172 AD2d 17; 576 N.Y.S.2d 896]

OPINION OF THE COURT

Levine, J.

Plaintiffs Lawrence J. Brady and Barbara A. Brady are married and reside in New Jersey. Lawrence Brady was employed and earned income in New York in 1988. Plaintiffs Judah I. Labovitz and Deborah R. Labovitz are husband and wife and reside in Pennsylvania. During 1988, Deborah Labovitz was employed and earned income in New York. Neither Barbara Brady nor Judah Labovitz had any New York source income in 1988. The Labovitz couple had unearned income from non-New York sources and had combined adjusted gross income of over $100,000. Both couples filed joint Federal income tax returns for 1988. They have brought this action to challenge the validity of New York's income tax treatment of nonresident taxpayers.

Under Tax Law § 601(e)(1), New York imposes a tax "on the taxable income which is derived from sources in this state of every nonresident". Section 601(e) provides for what is essentially a two-step process to determine the tax due. First, a preliminary tax is calculated "as if such nonresident * * * were a resident" (Tax Law § 601[e][1]). For residents, that tax is determined by applying the appropriate tax rate to the taxpayer's New York taxable income" (Tax Law § 601[a]-[c]), adding any additional tax due on unearned income if the taxpayer had New York adjusted

gross income in excess of $100,000 (*see*, Tax Law § 601[d]) and deducting various statutory credits (*see*, Tax Law § 606). New York taxable income is derived from "New York adjusted gross income" (less deductions and exemptions) (Tax Law § 611[a]), and New York adjusted gross income is in turn derived from the taxpayer's Federal adjusted gross income (*see*, Tax Law § 612). Once the tax is thus initially fixed as though the nonresident was a resident taxpayer, it is then multiplied by a fraction, the numerator of which is the nonresident's New York income and the denominator of which is that person's Federal adjusted gross income, in order to arrive at the final tax due (*see*, Tax Law § 601[e][1]). Thus, as agreed to by all parties, the initial tax computation for the liability of a nonresident taxpayer takes into account the taxpayer's income from all sources, within and without the State, but the actual tax due is that fraction of the tax initially determined that is equivalent to the ratio of the taxpayer's New York income to total income. Because the State's income taxation system is based upon progressive rates, a New York resident having no income except New York earnings will pay less tax on those earnings than a nonresident having the same New York earnings plus additional income from non-New York sources.

One additional facet of the State income tax structure affects the tax paid by non-New York residents on their New York source income. Under Tax Law § 651(b)(2), nonresident taxpayers and their nonresident spouses, like resident taxpayers and their resident spouses, must file a joint State income tax return (thereby reporting their aggregate incomes) if they filed a joint Federal tax return. Contrastingly, if one of the spouses is a resident and the other is a nonresident, they may elect to file either separate or joint State income tax returns, irrespective of whether they filed a joint Federal return (*see*, Tax Law § 651[b][4]).

Plaintiffs in this action seek a declaration of the unconstitutionality of Tax Law § 601(d) and (e) and § 651 (b)(2), an injunction against the enforcement of those sections, and damages for loss of the use of their money paid for taxable years

1988 and thereafter in excess of what they would have paid had Lawrence Brady and Deborah Labovitz been permitted to file individual State tax returns reporting only their New York source incomes and had their respective tax rates been based solely on such New York source income. They allege that the enforcement of State income tax liability against them under those sections denied them substantive due process and equal protection under the 14th Amendment of the US Constitution, and violated the Privileges and Immunities Clause (US Const, art IV, § 2, cl 1) and the Commerce Clause (US Const, art I, § 8, cl 3). Plaintiffs brought this action as a class action on behalf of one plaintiff class, i.e., all nonresidents required to file a New York income tax return, and two plaintiff subclasses, i.e., (1) those members of the nonresident class who have no New York source income but who are compelled to file a joint New York income tax return with their spouses, and (2) those members of the nonresident class who are subject to the tax imposed by Tax Law § 601(d) upon unearned income from non-New York sources.

Plaintiffs sought disclosure by way of production of documents concerning, *inter alia*, State administrative and legislative deliberations regarding the taxation of nonresidents and concerning the actual fiscal impact of the changes in the system of taxing nonresidents from 1986 to 1988. Supreme Court granted protective orders as to the disclosure sought because it viewed the requests as overbroad and not relevant to the constitutional issues. Next, plaintiffs moved for an order pursuant to CPLR article 9 certifying that the action could be maintained as a class action. Supreme Court denied plaintiffs' motion on the ground, *inter alia*, that plaintiffs did not show that a class action against the State in this matter is superior inasmuch as the doctrine of stare decisis could be asserted against defendants in the future. Finally, defendants moved for summary judgment dismissing the complaint and plaintiffs cross-moved for partial summary judgment declaring Tax Law § 601(d) and (e) and § 651(b) unconstitutional. Supreme Court granted defendants' motion and denied plaintiffs' cross

motion. Plaintiffs appeal from all of the foregoing adverse determinations.

Because the resolution of the constitutional issues involved in this appeal necessarily will affect the disposition of the remaining procedural issues, we address first whether Supreme Court properly dismissed plaintiffs' challenges to the validity of the provisions of the Tax Law in question. In our view, there is merit to plaintiffs' due process objection to Tax Law § 651(b)(2). By virtue of that provision, a nonresident having no New York source income whatsoever is compelled to file a joint New York income tax return solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return for the same taxable year. Concededly, a person obligated to file a State tax return or one who is a signatory to a joint return is civilly liable for the tax obligation arising therefrom, plus penalties (*see*, Tax Law § 685), and may also be exposed to criminal liability (*see*, Tax Law §§ 1801, 1804). In *Miller Bros. Co. v Maryland* (347 US 340, 344-345) the United States Supreme Court held, with respect to a State's power to tax extraterritorially, that there was a settled "consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Out-of-State cohabitation with a spouse having New York income and filing a joint Federal income tax return with that spouse cannot constitute the necessary minimum connection for the extraterritorial exercise of New York's taxing power. Thus, we have concluded that Tax Law § 651(b)(2) violates due process insofar as it may be applied to require a nonresident spouse of a nonresident taxpayer to file a joint State tax return solely by reason of the marital relationship and the filing by the couple of a joint Federal income tax return.

The foregoing ruling regarding Tax Law § 651(b)(2) renders academic plaintiffs' constitutional challenges to the validity of Tax Law § 601(d) and (e) that were based upon the interaction of those sections with section 651(b)(2). The language of Tax Law

§ 601(d) and (e) is "marriage neutral." Once a nonresident spouse having no New York income is no longer obligated to file a joint return, the remaining sections of the Tax Law at issue here are not subject to the objection that they increase a nonresident taxpayer's State tax liability on the basis of the non-New York income of that taxpayer's nonresident spouse.

Plaintiffs nonetheless argue that Tax Law § 601(e) is unconstitutional even in the absence of the joint filing requirement of Tax Law § 651(b)(2). They claim that the section violates due process because its inclusion of the nonresident's non-New York income in the initial determination of the tax before applying the apportionment formula is the functional equivalent of a tax on that out-of-State income. Alternatively, they assert that section 601(e) discriminates against nonresident taxpayers in favor of New York residents, thereby offending the Privileges and Immunities Clause, Equal Protection Clause and Commerce Clause of the US Constitution. We disagree with both contentions.

The procedure for taxing the New York source income of a nonresident set forth in Tax Law § 601(e), by initially applying a progressive tax rate to the taxpayer's income from all sources and then apportioning to fix the final tax due, is a valid means, under due process, of using income not itself taxable as part of the measurement of the tax imposed on the nonresident's New York income (*see, Maxwell v Bugbee*, 250 US 525, 539; *see also, Atlantic & Pac. Tea Co. v Grosjean*, 301 US 412, 425). Indeed, statutory provisions for taxing the in-State income of nonresidents virtually identical to Tax Law § 601(e) have been upheld over due process and equal protection objections in several recent decisions (*see, United States v State of Kansas*, 810 F2d 935, *affg* 580 F Supp 512; *Wheeler v State*, 127 Vt 361, 249 A2d 887, *appeal dismissed for want of substantial Federal question* 396 US 4; *see also, Stevens v State Tax Assessor*, 571 A2d 1195 [Me], *cert denied* -- US -- , 111 S. Ct 65; *Aronov v Secretary of Revenue*, 323 NC 132, 371 SE2d 468, *cert denied* 489 US 1096). Plaintiffs simply have not demonstrated that, under Tax Law § 601(e), their

income from non-New York sources is used in any respect other than as a measurement of the tax due on New York income, that is, in determining the rate of taxation applied to their New York income. Thus, plaintiffs' due process objection to Tax Law § 601(e) fails.

Likewise, Tax Law § 601(e) is not discriminatory in counting a nonresident's income from New York sources to determine the appropriate tax rate to be applied to a nonresident taxpayer's New York income. As previously described, the applicable tax rate for both residents and nonresidents is derived in the same manner and from the same ultimate source, i.e., Federal adjusted gross income, generally constituting income from all sources. Resident and nonresident taxpayers similarly situated in terms of ability to pay taxes out of all sources of income are treated the same within the parameters of New York's progressive income taxation system. Clearly, New York has a substantial legitimate interest in uniformly enforcing its progressive income tax system. We are also unpersuaded by plaintiffs' claim that discrimination against nonresident taxpayers exists because apportionment under Tax Law § 601(e) to fix the final tax due dilutes the value of their deductions and exemptions, as compared to their value for resident taxpayers. To whatever extent application of the ratio of New York income to total income dilutes the value of exemptions and deductions for nonresidents, it does so in direct proportion to the reduction of the final tax due from nonresidents. This hardly demonstrates any discrimination in favor of resident taxpayers.

We also find meritless plaintiffs' challenge to Tax Law § 601(d). That section, by its own terms, does not apply directly to nonresident taxpayers. The unearned income of a nonresident does, however, enter into the calculation to arrive at the nonresident's tax liability under section 601(e), because the initial determination of tax is made "as if such nonresident * * * were a resident." Nonetheless, as the earlier discussion herein demonstrates, the inclusion of the additional tax on unearned

income in the computation performed pursuant to Tax Law § 601(e) merely serves to add marginally to the tax rate applied to the nonresident's New York income. We have already sustained the validity of that use of non-New York income in taxing the New York income of a nonresident taxpayer.

It follows from the foregoing that the dismissal of plaintiffs' complaint should be modified by reinstating the cause of action challenging the constitutionality of Tax Law § 651(b)(2) and declaring that Tax Law § 651(b)(2) is unconstitutional as applied to require the filing of a joint income tax return by a nonresident solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return. The matter must be remitted to Supreme Court on the issue of damages (*see, Shields v Katz*, 143 AD2d 743, 745; *see also, Cass v State of New York*, 58 NY2d 460, 463; *Weissman v Evans*, 56 NY2d 458).

This resolution of the substantive issues, in our view, further militates toward upholding Supreme Court's denial of class action certification. It was plaintiffs' burden to establish, *inter alia*, that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901[a][5]; *see, Askey v Occidental Chem. Corp.*, 102 AD2d 130, 137-138). The determinative constitutional issues regarding liability have now been resolved. Not only will the determination of the invalidity of Tax Law § 651(b)(2), as applied, be given stare decisis effect in any future litigation, but defendants have stipulated to being bound by it on all duly and timely filed administrative claims. Thus, the remaining unresolved issues for entitlement to monetary relief appear to be primarily personal to the individual members of the class of nonresident taxpayers, i.e., eligibility for a refund and the amount of overpayment.

The law in New York is settled that no cause of action lies for restitution of an unconstitutionally collected tax that was paid voluntarily (*see, Paramount Film Distrib. Corp. v State of New*

York, 30 NY2d 415, 420, *cert denied* 414 US 829; *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 426). Therefore, entitlement to monetary relief will require some initiative on the part of the individual taxpayer, by way of protest or proper claim for a refund. For all the foregoing reasons, we agree with Supreme Court that the superiority of a class action over other available methods for resolution of the controversy involved in this litigation has not been established (*see, Conklin v Town of Southampton*, 141 AD2d 596, 597-598; *Gandolfi v City of Yonkers*, 101 AD2d 188, 198-199, *affd* 62 NY2d 995; *see also, Garden City Center Assocs. v Board of Assessors*, 153 AD2d 667, *lv dismissed* 75 NY2d 804; *Duffy v Wetzler*, 148 Misc 2d 459.

Lastly, as to the appeal from the discovery rulings of Supreme Court, our decision herein resolves the substantive issues regarding which plaintiffs sought discovery and, thus, obviates the need for such disclosure. Supreme Court's protective orders should, therefore, be affirmed.

MAHONEY, P.J., WEISS, YESAWICH, JR., AND MERCURE, JJ., concur.

Ordered that the order entered September 12, 1990 and judgment entered thereon are modified, on the law, without costs, by reversing so much thereof as granted defendants' motion dismissing the cause of action in the complaint challenging the constitutionality of Tax Law § 651(b)(2) and denied plaintiffs' cross motion on said cause of action; motion denied and cross motion granted on said cause of action, partial summary judgment awarded to plaintiffs, it is declared that Tax Law § 651(b)(2) is unconstitutional as applied to require the filing of a joint New York income tax return by a nonresident solely because that person's nonresident spouse earned New York income and the couple filed a joint Federal income tax return, and matter remitted to the Supreme Court for further proceedings not inconsistent with this court's decision; and, as so modified, affirmed.

Ordered that the orders entered February 15, 1990 and judgments entered thereon are affirmed, without costs.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ, and JUDAH I. LABOVITZ, Individually and on behalf of all Others Similarly Situated,

Plaintiffs,

- against -

MEMORANDUM DECISION

THE STATE OF NEW YORK, MARIO CUOMO, Governor of the State of New York, and JAMES WETZLER, Commissioner of Taxation and Finance of the State of New York,

Defendants.

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Supreme Court, Albany County Motion Term, February 27, 1990 (adjourned) and April 3, 1990

[Decided July 9, 1990]
Justice Daniel H. Prior, Jr., Presiding
(Motion #01-89-0181o8)

APPEARANCES:

For the Motion: Hon. Robert Abrams
Attorney General of the State of New York
Attorney for Defendants
David Fruchter, Esq., of Counsel

In Opposition and for the Cross-Motion: Goodkind, Labaton & Rudoff
Attorneys for Plaintiffs

PRIOR, J.:

Defendants bring a Motion, pursuant to CPLR § 3212, seeking an Order granting defendants Summary Judgment as to all the issues raised by plaintiffs in their Amended Complaint. Plaintiffs Cross-Move, pursuant to CPLR §§ 3212(e) and 2215, for an Order granting Partial Summary Judgment in favor of plaintiffs declaring §§ 601(d), 601(e) and 652(b)(2) of the New York Tax Law to be unconstitutional.

The above-captioned action was commenced by plaintiffs who are seeking Equitable and Declaratory Relief from the aforementioned Tax Law statutes on the ground that they are unconstitutional. In short, plaintiffs allege that §§ 601(d), and 601(e) and 651(b)(2) of the New York Tax Law are unconstitutional and that they are unconstitutional on their face and by operation of Law, they are violative of Due Process, deny plaintiffs Equal Protection of the law, abridge the privileges and immunities of citizens, violate the Supremacy Clause and violate plaintiffs federal rights. Their Amended Complaint seeks a statutory claim for damages, injunctive relief, declaratory relief and attorneys fees for this violation of plaintiffs rights under the United States Constitution and the New York Constitution. Plaintiffs have previously been denied preliminary injunctive relief and class action certification status by this Court.

Defendants allege in their Motion for Summary Judgment that plaintiffs challenge to the constitutionality of the statutes in question must be summarily dismissed as a matter of law as none of their contentions have any merit. In support of their Motion, defendants argue that, contrary to plaintiffs claims, the Tax Reform and Reduction Act of 1987, hereinafter referred to as "TRARA," imposes an income tax under which residents and non-residents alike are subject to the same underlying rates of taxation, credits, deductions and exemptions, and that in the case of non-residents, it taxes income derived from New York sources by utilizing apportionment (via a tax equation). Defendants also argue

that the illustration of an application of the 1988 income tax non-resident liability that is contained in the Amended Complaint is incomplete, incorrect and actually contradicts plaintiffs contentions. Defendants go on to show that no New York tax burden is imposed on the spouse (of a New York income earner) with no New York income by virtue of the joint filing requirements and that there is no discrimination against non-resident couples in the filing requirement of § 651(b)(2).

Plaintiffs, in turn, argue that §§ 601(d), 601(e) and 651(b)(2) are unconstitutional (reference is made to plaintiffs Memorandum of Law for a complete discussion of same) and that their cause of action is clearly established as a matter of law sufficient to entitle them to Partial Summary Judgment relative to the constitutionality issue.

The Court approaches this inquiry bearing in mind that a statute will be interpreted, if possible, so as to uphold its constitutionality and in accordance with its manifest intent and purpose. [Matter of Sarah K, 66 NY2d 223, 238]. That is because there is a simple, but well-founded presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt. [Dorset v. Cultural Resources, 46 NY2d 358, 370]. This presumption of a tax statutes constitutionality can be overcome only by the most explicit demonstration that the challenged classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. [Trump v. Chu, 65 NY2d 20, 25; citing Madden v. Kentucky, 309 US 83].

The Court notes that both plaintiffs and defendants have submitted well-researched Memoranda of Law relative to their respective positions. Defendants offer the Affidavit of one John Hudder, Deputy Commissioner for Tax Policy Analysis for respondent State Department of Taxation and Finance. In his Affidavit, Mr. Hudder goes through a detailed analysis of the tax statutes in

question as they apply to the hypothetical situations presented in plaintiffs Amended Complaint and those presented in the Exhibits attached to said Affidavit. The conclusion reached in this Affidavit is that these statutes do not negatively impact upon persons similarly situated to the position of plaintiffs. The Court notes that plaintiffs do not controvert Mr. Hudder's analysis, but instead, rely on affidavits previously used in preceding Motions that do not specifically refer to Mr. Hudder's arguments, and also rely once again on their unconstitutionality arguments. In fact, all that plaintiffs themselves have to offer as to issues of fact are statements to the effect that they "may be placed in the position in future years of foregoing our federal right (to file a joint federal tax return) because of the burden on it which New York has imposed." As the Court will further discuss, plaintiffs failure to raise issues of fact will prove fatal to their causes of action.

As discussed in this Court's August 17, 1989 Memorandum Decision pertaining to plaintiffs Motion for a Preliminary Injunction, the fact patterns upon which plaintiffs base their claims are all hypothetical. Plaintiffs have consistently failed throughout this proceeding to allege specific facts as they explicitly apply to them as individuals. As mentioned in the preceding paragraph, plaintiffs have opted to refer to what may happen or how these laws may affect them tax-wise, but offer no real facts. They offer not even a scintilla of proof of facts that actually relate to their tax situation and the impact of the tax laws in question upon them, i.e., actual New York income tax liability based upon unconstitutionally calculated New York income comparing that with other taxpayers who are not burdened with this law, etc. Plaintiffs have exclusive knowledge of specific facts as they apply to their tax situation but have failed to reveal same - relying instead on hypothetical situations and speculatory comments. Notwithstanding the admonishment contained in the Court's August 17, 1989 Memorandum Decision, relative to the lack of specific, real facts, plaintiffs once again fail to reveal the same - even in the face of a Summary Judgment Motion.

The Court concludes that defendants have established their entitlement to Summary Judgment by making a prima facie case as to the statutes presumed constitutionality and the absence of a negative impact upon non-resident taxpayers and their spouses. Plaintiffs, on the other hand, have failed to lay bare their proof in evidentiary form that issues of fact actually exist sufficient to defeat defendants Motion.

The New York Court of Appeals has repeatedly held that in order to obtain Summary Judgment, a movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose. [Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966, 967, citing Zuckerman v. City of New York, 49 NY2d 557].

What the Court is left with, in essence, is a Declaratory Judgment action that seeks little more than an advisory opinion as no case or controversy exists. In an action for declaratory relief there must be a genuine legal dispute, a "justiciable controversy," between the parties, and declaratory relief will not be granted where it will result only in an advisory opinion. [Harrington v. State of New York, 114 Misc2d 351, 353; aff'd 94 AD2d 863; aff'd 62 NY2d 626; citing New York Public Interest Research Group v. Carey, 42 NY2d 527].

The "justiciable controversy" upon which a declaratory judgment may be rendered requires not only that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action, but also that the controversy involve present rather than hypothetical, contingent or remote prejudice to plaintiffs. [American Ins. Assn. v. Chu, 64 NY2d 379, 383]. Thus, no

"justiciable controversy" exists as plaintiffs have failed to satisfy the "present prejudice" requirement.

Defendants Motion for Summary Judgment is granted.

Plaintiffs Cross-Motion for Partial Summary Judgment is therefore denied, as moot.

Papers to the Attorney General to submit Order on formal notice of Settlement. A copy of this Decision is to be attached thereto.

Dated: July 9, 1990 at
Albany, New York

/s/
Daniel H. Prior, Jr.
Justice of the Supreme Court

APPENDIX E

At a Term of the Supreme Court of the State of New York, held in and for the County of Albany, New York.
[September 12, 1990]

PRESENT: HON. DANIEL H. PRIOR, JR.,
Justice Presiding

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

LAWRENCE J. BRADY, BARBARA A. BRADY, DEBORAH R. LABOVITZ AND JUDAH I. LABOVITZ, Individually and on behalf of all Others Similarly Situated,

Plaintiffs,

ORDER

-against-

Index No. 1721-89

THE STATE OF NEW YORK, MARIO CUOMO, Governor of the State of New York, and JAMES WETZLER, Commissioner of Taxation and Finance of the State of New York,

RJI No. 0189 018168

Defendants

(Judge Prior)

The defendants having made a motion for summary judgment as to all of the issues raised in the plaintiffs' amended complaint, which motion was originally returnable February 27, 1990, but was adjourned to April 3, 1990, and the plaintiffs having

made a cross-motion for partial summary judgment, which cross-motion was returnable April 3, 1990,

AND, the Court having read the defendants' Notice of Motion dated January 3, 1990, the affidavit of John Hudder, sworn to December 18, 1989, the affirmation of David Fruchter, Esq., dated January 3, 1990, the defendants' Memorandum of Law dated January 3, 1990 and the defendants' Reply Memorandum of Law dated April 2, 1990, all submitted in support of the defendants' motion and in opposition to the plaintiffs' cross-motion,

AND, the Court having also read the plaintiffs' Notice of Cross-Motion for Partial Summary Judgment dated March 26, 1990, the affidavit of Barbara A. Brady, sworn to on April 6, 1989, the affidavit of Stuart Hefter, sworn to on May 2, 1989, the affidavit of Judah I. Labovitz, sworn to on July 19, 1989, the affidavit of Scott H. Mustin, Esq., sworn to on May 9, 1989, two affidavits of David H. Weinstein, Esq., sworn to on April 10, 1989 and May 9, 1989 respectively, and the plaintiffs' Memorandum of Law dated March 26, 1990, all submitted by the plaintiffs in opposition to the defendants' motion and in support of the plaintiffs' cross-motion,

AND, the aforesaid motions having been considered upon submission of papers without oral argument, and due deliberation having been had, and the Court having determined that the defendants are entitled to summary judgment as to all of the issues raised in the plaintiffs' amended complaint, and the Court having issued a written decision dated July 9, 1990, which written decision is annexed hereto and made a part hereof, it is hereby

ORDERED, ADJUDGED AND DECREED, that the defendants' motion for summary judgment is granted in all respects, and the plaintiffs' cross-motion for partial summary judgment is denied in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendants are hereby awarded Three Hundred Dollars ($300.00) in costs against the plaintiffs, consisting of Two Hundred Dollars ($200.00) in action costs pursuant to Section 8201 of the Civil Practice Law and Rules and One Hundred Dollars ($100.00) in motion costs pursuant to Section 8202 of the Civil Practice Law and Rules; and it is further

ORDERED, ADJUDGED AND DECREED, that the Albany County Clerk is hereby directed to enter a Judgment in the amount of Three Hundred Dollars ($300.00) in favor of the defendants against the plaintiffs for the aforesaid costs.

DATED: Albany, New York,
September 12, 1990

ENTER:

/S/
HONORABLE DANIEL H. PRIOR, JR.
Justice of the Supreme Court

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petition for Writ of Certiorari and accompanying Appendices to be served upon the following attorneys for respondents by United States first class mail, postage prepaid:

Hon. Robert Abrams,
Attorney General of the
State of New York
Daniel Smirlock,
Assistant Attorney General
The Capitol
Albany, New York 12224

Dated: April 21, 1993

/s/ David H. Weinstein
DAVID H. WEINSTEIN